113—205

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 855.

JOHN T. CARDWELL, APPELLANT,

vs.

THE AMERICAN RIVER BRIDGE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JUNE 2, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 855.

JOHN T. CARDWELL, APPELLANT,

vs.

THE AMERICAN RIVER BRIDGE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Affidavit to complaint	17	6
Subpœna	18	7
Marshal's return	19	7
Demurrer to bill	20	8
Affidavit to demurrer	22	8
Order overruling demurrer	24	9
Order vacating order overruling demurrer, &c.	26	9
Decree	30	10
Memorandum of costs, &c.	32	11
Opinion	35	12
Order allowing appeal	38	18
Bond	40	19
Clerk's certificate	44	20
Citation	45	20

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Enrolled Papers. Bill in Equity.*

In the Circuit Court of the United States in and for the District of California.

JOHN T. CARDWELL, Complainant,
vs.
THE AMERICAN RIVER BRIDGE COMPANY, Defendant.

To the honorable the justices of the circuit court of the United States for the ninth circuit, within and for the district of California:

John T. Cardwell, a citizen of the United States, residing in the county of Sacramento, in the State of California, brings this his bill against The American River Bridge Company, a corporation organized under the laws of the State of California, and having its principal place of business at San Francisco, California, and, humbly complaining, shows unto your honors:

That the American river is a known public river of the United States, situated within the State of California, and is and always has been from time immemorial a navigable stream from its
2 mouth to and above the lands of your orator herein mentioned for boats, vessels, and other water craft carrying three hundred tons burden and under.

That prior to the obstructions placed therein by the defendant, hereinafter complained of, the said river had been and was for many years used and navigated by licensed, enrolled, and registered vessels laden with cargoes of lumber, merchandise, grain, hay, and other products of the adjacent country for the Sacramento and San Francisco and other markets by the way of the Sacramento river; also a known public and navigable river of the United States from its confluence with the said American river to the waters of the bay of San Francisco.

That said American river is now and always has been a common and public highway accessible to and free for all the people of this State and of the United States, and has been used, and is now susceptible of being used, as a means of commerce by the people of this State and of all the other States of the Union.

That said American river empties into the Sacramento
3 river at or near the city of Sacramento, in this State, and to a point some distance above the obstructions hereinafter complained of is within the regular ebb and flow of the ocean tides; and for some distance above the lands of complainant it is of sufficient depth and width of channel to admit the passage of boats and other vessels of commerce from the bay of San Francisco passing up the said Sacramento river into and up the said American river.

That by the act of Congress of September 9th, 1850, admitting the State of California into the Union, it is declared that "all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, import, or duty therefor."

That on the —— day of November, A. D. 1879, your orator was

and ever since has been, and now is, the owner in fee of a ranch containing four thousand acres of land, of the value of seventy-five thousand dollars, situated immediately on the north bank of the said American river, opposite the town of Folsom, in the county of Sacramento, in said State of California.

4 That the said tract of land belonging to your orator has a frontage upon said American river of about two miles.

And that your orator has a landing-place thereon suitable for loading and unloading passengers and all kinds of freight from boats and vessels navigating the said river; that said ranch is about thirty miles by the course of the river above the mouth of said river.

That twenty-five hundred acres of said ranch is valuable for wheat lands, and your orator has had about fifteen hundred acres of said land in cultivation in wheat ever since he has owned said ranch, and that the same has yielded about twenty bushels per acre per annum.

That there are about ten thousand cords of wood on said land, of the value of fifteen thousand dollars; that there are valuable granite quarries on said land, enough to quarry and supply the markets of Sacramento and San Francisco for fifteen years.

That there is also upon said land, along the bank of said river, valuable cobble, enough for twenty years' shipping.

That complainant, since he has owned said land, has been
5 the owner of a steamer "Daisy," and has built two barges, of the value of eight thousand dollars, expressfully for the navigation of the said American river, and for the purpose of transporting freight and passengers up and down said river, from its mouth to and above the said lands of complainant, and that complainant endeavored to navigate said river with his said steamboat, but was prevented from doing so solely by the obstructions placed therein by defendant, as herein stated.

That complainant was in like manner prevented from using or towing his said barges upon said river, and from in any manner using the same as a public highway.

That the said American river is naturally a navigable stream for the distance of thirty miles above the obstructions herein mentioned, and from its mouth to the distance of one-half of a mile above complainant's said land, the navigation whereof is by law and of right ought to be and remain forever free and unobstructed to all the citizens of the United States; and by reason thereof your orator, during all the times herein mentioned, ought to have had, and still of
6 right ought to have, as the owner and proprietor of said licensed steamboat and said barges, the right to have engaged and now to engage in the business of transporting freight and passengers upon said American river.

That pursuant to said act of Congress of September 9th, 1850, your orator ought to have a free and unobstructed passage-way over and upon the waters of said river, up and down the entire navigable extent of the same, and to and from said ranch to go, return, pass, and repass every year, and at all times of the year, at his free will

and pleasure, and as his commercial interests and necessities may require.

Yet the defendant, The American River Bridge Company, well knowing the premises, but wrongfully and unjustly intending and contriving to injure your orator in that behalf, and to deprive him of the free navigation of said American river, and to prevent vessels and steamboats and other water craft from having access to the said lands of your orator, and to deprive him of the use and profit of his said lands for the purposes aforesaid, and of the use, profits, and benefits of his said towing business, and of the use and profits of his
7 said licensed steamboat, and without any right or authority so to do, wrongfully and unlawfully and injuriously, at a point about one and one-half miles above the mouth of said American river, has driven into the bed and channel of said river a great number of wooden piles, and constructed thereon wooden piers; and upon said piles and piers said defendant has constructed a bridge across said river, from the west bank to the east bank thereof, which said bridge is supported by said piles and piers so down into the bed and channel of said river. That said bridge is of the width of about twenty feet, and of the length of about three hundred feet, and is used as a roadway across said river.

That the floor of said bridge is about fourteen feet above extreme low water and about five feet above extreme high water, whereby the navigation of said river has been, and now is, wholly obstructed, and steamboats, vessels, and all other water craft are prevented from passing the place where said bridge is situated, and from passing up or down said river to or from the lands of your orator.

That there is no draw or opening in said bridge, and it extends so near the surface of the water as to wholly prevent all
8 kinds of steamboats and vessels from passing under it. All of which is contrary to the aforesaid act of Congress of September 9th, 1850, admitting California into the Union.

That on the 6th day of May, 1861, the Legislature of the State of California passed an act entitled "An act to grant the right to construct a bridge across the American river to certain parties," approved May 6th, 1861.

That by section I of said act it is provided as follows:

"R. A. Pearis and L. B. Harris, as trustee for the use and benefit of Amanda C. Harris, together with such as they may admit, shall take, have, possess, and enjoy all the rights, privileges, rights of way, franchises and immunities heretofore mentioned, upon condition that they and their associates shall incorporate themselves under the general laws of the State, regulating corporations and providing for the incorporation of bridge companies, and shall adopt the name of American River Bridge Company, and shall abide by and fulfil the further conditions hereinafter mentioned."

9 That pursuant to said act the said defendant was organized as a corporation by the parties therein named, and for the purpose mentioned in said act.

That said parties thereupon pretended to assign and transfer the rights and franchises attempted to be conferred upon them by said

act of the Legislature to defendant. And complainant avers that said defendant claims the right to build and maintain said bridge upon and across said river pursuant to the provisions of said act.

And your orator avers that said act is in conflict with sections 31, article IV, of the constitution of the State of California of December 20th, 1849, and section 1, article XII, of the constitution of the State of California of May 7th, 1879, and in contravention of the aforesaid act of Congress admitting California into the Union, and is wholly null and void, and confers no power or authority upon defendant to construct or maintain said bridge, or in any manner to obstruct the navigation of said American river.

That complainant's said land ever has and does produce about one thousand five hundred tons of wheat per annum
10 which he has to transport and sell in the San Francisco market.

That if the navigation of said river was free and unobstructed by defendant as aforesaid, complainant could and would ship and transport it down said river to the San Francisco market at about one dollar and a half per ton cheaper than he can otherwise transport the same to said market.

That your orator is also compelled to transport and sell his wood in the markets of Sacramento and San Francisco, and that if the navigation of said river was not obstructed by defendant as aforesaid the complainant could and would transport the said wood to said markets for at least one and one-half dollars per cord cheaper than he can otherwise do.

That the aforesaid granite and cobble could be easily and cheaply shipped and transported down said river to the San Francisco and other markets were it not for said obstructions to the navigation of said river, and upon such terms that the complainant could and would realize a profit thereon of five thousand dollars per annum.

That all other means of transportation thereof are so costly
11 that the complainant cannot ship or transport the same at any profit, but only at a great loss, so that the said granite and cobble quarries are rendered wholly valueless to your orator.

That complainant has also lost the profits of outside freighting on his said steamer "Daisy" and his barges, amounting to at least three thousand dollars for the year 1882.

That complainant also suffers great loss from said obstructions to the navigation of said river in the difference in the cost of transportation of all freights and supplies shipped from the markets to his said ranch, which costs complainant at least one-half more than he would have to pay had the defendants not obstructed the navigation of said river as aforesaid.

That by reason of said obstructions in said river complainant is deprived of the free and unobstructed use and enjoyment of his said land, and that access and egress to and from the same by means of said navigable river is wholly obstructed and cut off, and that the rental value of his said land is greatly diminished thereby.

That complainant, since he has owned said land, has shipped therefrom by railroad, the only means of transportation there-

12 from he now has, over five thousand tons of wheat, at a cost of one dollar and a half per ton more than he would have had to pay had not defendant so obstructed the navigation of said river, and has also shipped from his said land over ten thousand cords of wood by railroad at a cost of one dollar and a half per cord more than he would otherwise have had to pay had not defendant so obstructed the navigation of said river, and has thereby been damaged more than twenty thousand dollars.

All of which actings, doings, and pretences of the defendant by the placing of said pier, and the construction of said bridge will and do impede, hinder, and obstruct the navigation of said river, and do and will hinder and obstruct your orator in the business of towing barges on said river, and of navigating said river with steamboats, vessels, and other water craft, and have occasioned special damage to your orator, and do and will occasion special, continuing, and irreparable damage to your orator as the owner of said land, wood, wheat, granite, and cobble, as aforesaid, by preventing steamboats, vessels, barges, and other water craft from navigating said river, and from having access to complainant's said land,

13 and transporting or taking and discharging cargoes therefrom, as aforesaid, for which there is no plain, speedy, or adequate remedy at law, but, on the contrary, such injury is irreparable by any action or actions at law, and by reason of said piers, so placed in and across said channel of said river as aforesaid, and of said bridge so placed across said American river, for a long space of time, to wit, ever since said complainant has owned said land, and thereby during all that time the navigation of the said river to and from said lands of complainant, and the business of your orator in navigating said river by his said steamboat, and towing with his said steamboat barges laden with freight on said river, as aforesaid, has been obstructed and stopped.

And your orator by means thereof could not, during the time aforesaid, nor can he now, have and enjoy his right of way upon said river, as he of right ought to have done, or otherwise might or would have done, and hath been, and is by means of the premises, deprived of the use, benefit, profit, and advantage of towing as aforesaid, and of navigating said river with his said steamboat, and of the benefit, use, and profit of the said lands, wood, wheat, cob-

14 ble and granite as aforesaid, and is injured, and continues to be injured, and to sustain damage, and the lands, wheat, wood, granite, cobble and other property of complainant upon said river is depreciated in value, and continues to be damaged and rendered less valuable.

That the said bridge and the obstructions so placed in said river by the defendant, as aforesaid, constitute and are a great public and private nuisance, and has caused, and will continue to cause, great and irreparable damage as aforesaid.

That the said defendant, though often requested so to do by your orator, refuses to remove the same, but threatens and declares its intention to continue to maintain said bridge across said river as it has been doing during all the times herein stated.

15 To the end, therefore, that your orator may have that relief which can only obtain in a court of equity, and that the said defendant may answer the premises under its corporate seal, and that said defendant may be decreed to forever desist and refrain from obstructing the navigation of said American river by means of said bridge, or otherwise, and to abate and remove the said nuisance and obstruction to the free navigation of said river by placing a draw in said bridge, of length to be prescribed by this court, sufficient to admit all steamboats, vessels, and water craft capable of navigating said river to pass and repass freely and with safety through the draw of said bridge, to be so prescribed by this court; and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require:

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said American River Bridge Company, its officers, engineers, contractors, agents, servants, and employees, commanding them and each of them to absolutely desist and refrain from further maintaining said bridge across said American river until a draw shall have been placed in said bridge, the length of which shall be prescribed by this court, sufficient to admit
16 all steamboats, vessels, and water craft capable of navigating said river to pass and repass freely and with safety through the draw of said bridge, to be so prescribed by this court.

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said American River Bridge Company, thereby commanding it, by its officers and agents, at a certain time and under a certain penalty therein, to be limited, to appear before this honorable court and there full and true, direct and perfect answer make, under its corporate seal, to all and singular the premises, and further to stand, to perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And your orator will ever pray.

JOHN T. CARDWELL,
SCRIVNER & McKINNE,
Solicitors for Complainant.

J. J. SCRIVNER,
Of Counsel.

17 *Affidavit.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

John T. Cardwell, being duly sworn, on his oath says: That he is the complainant in the foregoing-entitled case; that he has heard read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

JOHN T. CARDWELL.

Subscribed and sworn to before me, this 8th day of May, A. D. 1883.

JOS. F. O'BEIRNE,
Commissioner of U. S. Circuit Court.

Endersed: Filed May 8th, 1883. L. S. B. Sawyer, clerk. J. F. O'Beirne, deputy clerk.

18 *Subpœna.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

The President of the United States of America to The American River Bridge Company, defendant, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the fourth day of June, A. D. 1883, to answer a bill of complaint exhibited against you in said court by John T. Cardwell, who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and eighty-
19 three, and of our Independence 107.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

Memorandum Pursuant to Rule 12.

Supreme Court U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of June next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of May, 1883, and personally served the same on the 8th day of May, 1883, by delivering to and leaving with L. B. Harris, president of the American River Bridge Company, said defendants named therein, personally, at the city and county of San Francisco, in said district, an attested copy thereof, together with a copy of the bill of

complaint, certified to by J. J. Scrivner, att'y for plaintiff, attached thereto.

San Francisco.

M. M. DREW,
U. S. Marshal.
By B. J. AKERMAN, *Deputy.*

Endorsed: Filed May 9th, 1883. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

20 *Demurrer to Bill.*

In the Circuit Court of the United States in and for the District of California.

JOHN T. CARDWELL, Complainant,
vs.
THE AMERICAN RIVER BRIDGE COMPANY, Defendant.

The demurrer of the American River Bridge Company to the bill of complaint of John T. Cardwell, July 2d, 1883.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against this defendant, touching the matters contained in said bill or any of such matters. And for a further cause of demurrer this defendant saith that it appears by said complainant's own showing by his said bill of complaint that this court has no jurisdic-
21 tion to grant the relief therein prayed as between the parties to this suit. Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint this defendant doth demur to the said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

H. O. & W. H. BEATTY,
Solicitors for Defendant.

I certify that in my opinion the foregoing demurrer of the American River Bridge Company, defendant to the bill of complaint of John T. Cardwell, complainant, is well founded in law and proper to be filed in the above cause.

J. B. HAGGIN,
Counsel for Defendant.

22 *Affidavit to Demurrer.*

UNITED STATES OF AMERICA, }
District of California, } *ss:*

L. B. Harris, being duly sworn, deposes and says: That he is the

president of the above-named corporation, defendant, and makes this affidavit in behalf of said defendant by its authority and direction.

That he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

LEW. B. HARRIS.

Subscribed and sworn to before me, this 2nd day of July, 1883.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

23 Copy served July 2, 1883.

SCRIVNER & McKINNE,
Solicitors for Complainant.

Endorsed: Filed July 2d, 1883. L. S. B. Sawyer, clerk.

24 *Order of Court.*

At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 23rd day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JOHN T. CARDWELL
vs.
AMERICAN RIVER BRIDGE COMPANY. } No. 3010.

On motion of J. J. Scrivner, Esq., on behalf of complainant, no one appearing for the demurrer herein, it is ordered that said demurrer be, and the same hereby is, overruled under rule 42 of this court.

25 I hereby certify that the foregoing is a full, true, and correct copy of an original order entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 3rd day of March, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

26 *Order of Court.*

At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room, in the city and county of San Francisco, on Monday, the 30th day of July,

in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JOHN T. CARDWELL
vs.
THE AMERICAN RIVER BRIDGE COMPANY. } No. 3010.

This cause coming on to be heard this day upon the motion to vacate the order heretofore made overruling the demurrer herein, W. H. Beatty, Esq., appearing for said demurrer, and J. J. Scrivner, Esq., in support of the bill of complaint herein, by consent of the respective counsel it is ordered that said order overruling the demurrer be, and the same hereby is, vacated, and said demurrer was argued and submitted to the court for consideration and decision.

27 I hereby certify that the foregoing is a full, true, and correct copy of an original order entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 4th day March, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

28 *Decree.*

United States Circuit Court, Ninth Circuit, District of California.

JOHN T. CARDWELL, Complainants,
v.
THE AMERICAN RIVER BRIDGE COMPANY, Defendant. } No. 3010.

The complainant filed his bill of complaint herein on the 8th day of May, 1883, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the fourth day of June, 1883, which is hereto annexed.

The defendant appeared herein on the 4th day of June, 1883, by H. O. & W. H. Beatty, Esq'rs, its solicitors.

A demurrer to said bill of complaint was filed herein on the 2nd day of July, 1883, which demurrer is hereto annexed.

An order overruling said demurrer was made and entered herein on the 23d day of July, 1883, a certified copy of which order is hereto annexed.

29 An order vacating said order overruling said demurrer was made and entered herein on the 30th day of July, 1883, a certified copy of which order is hereto annexed.

Thereafter a final decree was filed and entered herein, in the words and figures following, to wit:

30 At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America, of the ninth

judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 3d day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JOHN T. CARDWELL
vs.
AMERICAN RIVER BRIDGE COMPANY. } No. 3010.

The court having sustained the defendant's demurrer to the complainant's bill of complaint and ordered that said bill be dismissed, thereupon, *open* consideration *therefore*, it is ordered, adjudged, and declared that the said complainant's bill be, and the same hereby is, dismissed, at complainant's costs.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Jud. Cir't

31 Endorsed: Filed and entered March 3d, 1884. L. S. B. Sawyer, clerk.

32 *Memorandum of Costs and Disbursements.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

JOHN T. CARDWELL, Plaintiff,
vs.
THE AMERICAN RIVER BRIDGE CO., Defendant.

Disbursements.

Marshal's fees	$	
Clerk's fees	$10	
Witness' fees	$	
Printing briefs on demurrer, (disallowed)	$19	
Affidavit to this memorandum	$	50
Docket fee	$	
	$29	50
	19	
Taxed at	$10	50

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Dep'y Cl'k,*

UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco. } *ss:*

J. B. Haggin, being duly sworn, deposes and says: That he is

agent for the defendant in the above-entitled cause, and as
33 such is better informed relative to the above costs and disbursements than the said defendant.

That the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

J. B. HAGGIN.

Subscribed and sworn to before me, this fifth day of March, A. D. 1884.

[SEAL.] JOHN E. HAMILL,
Notary Public.

To Messrs. SCRIVNER & MCKINNE,
Attorneys for Complaint:

You will please take notice that on Saturday, the 8th day of March, A. D. 1884, at the hour of 11 o'clock a. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

W. H. BEATTY,
Attorney for Defendant.
J. B. HAGGIN,
Of Counsel.

Service hereof admitted and copy received, this 5th day of March, 1884.

SCRIVNER & MCKINNE,
Solicitors for Complainant.

Endorsed: Filed this 5th day of March, A. D. 1884. L. S. B. Sawyer, clerk. By F. D. Moncton, d'p't. clerk.

34 Whereupon said pleadings, subpœna, orders, final decree, and memorandum of taxed costs are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest: L. S. B. SAWYER, *Clerk.*
[SEAL.] By F. D. MONCTON, *Deputy Clerk.*

Endorsed: Enrolled papers. Filed March 3rd, 1884. L. S. B. Sawyer, clerk. By F. D. Moncton, deputy clerk.

35 *Opinion.*

Circuit Court, District of California.

CARDWELL *v.* AMERICAN RIVER BRIDGE COMPANY.

Decided March 3, 1884.

INTERNAL NAVIGABLE WATERS—POWER OF CONGRESS OVER.—Congress has power, under its authority to regulate commerce and establish post-roads, to control for those purposes the internal navi-

gable waters of the various States. As soon as Congress legislates in regard to any such navigable waters, its power becomes exclusive, and the States cannot afterward authorize any material obstruction to their navigation; but till Congress acts, the Legislature of any State has the power to authorize the obstruction of any navigable waters within its borders by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse.

THE ACT OF CONGRESS ADMITTING CALIFORNIA INTO THE UNION, which provides that all the navigable waters within the State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor, it would seem, should be regarded as a valid regulation by Congress of the navigable waters of California, which would withdraw them from the operation of State legislation authorizing the construction of a bridge over a navigable stream, such as the American river, that would utterly destroy its navigability.

The case of Escunaba Co. *v.* Chicago, 107 U. S., 679, commented on, and the points supposed to distinguish it from that case pointed out.

Demurrer to bill.—The bill alleges that the American river is navigable in fact for steamboats and barges for thirty miles from its mouth to Folsom; that complainant is the owner of several thousand acres of land bordering for a long distance on the river below Folsom; that he raises on said lands several thousand tons of grain yearly; that he is the owner of a steamboat and other vessels, by which he could and would ship his grain down the river but for the obstruction interposed by the bridge in question; that there are large deposits of cobble-stones in the bed and on the borders of the river on his land, which have a large market value in San Francisco for paving and other purposes, which, but for the said obstructions, he could ship by his vessels and sell at a large profit, whereas the expense of sending them by rail and other means open to him is such that he is unable to dispose of them at all, or so as to make it profitable; that in pursuance of the authority of an act of the Legislature of California the defendant has erected a low bridge without any draw in it or other means of passing the bridge, by means of which the navigation of the river by complainant's steam and other boats is wholly obstructed, to his damage many thousand dollars every year. He asks a decree either compelling defendant to remove the bridge or else place a suitable draw in it, so as to permit the passage of steamers and other vessels capable of navigating the river.

Scrivener & McKune, for the complainant.

H. O. & W. H. Beatty and J. B. Haggin, for the defendant.

By the court, SAWYER, circuit judge:

This case is clearly within the rule as laid down in the Wallamet Bridge Case, 7 Saw., 127. If that case can be sustained in the broad terms of the rule stated, then the demurrer in this case should be overruled. Since that decision was rendered the Supreme

Court of the United States has decided the case of Escanaba Co. *v.* Chicago, 107 U. S., 679, which defendant insists overrules the principle announced in the Wallamet Bridge Case; that under the clause of the act admitting Oregon into the Union the State has no power to authorize the construction of bridges over the navigable waters of the State which shall materially obstruct their navigation. It must be admitted, I think, that there is language in the opinion that favors that view; and I am by no means certain that the court did not intend to go as far as its broadest language indicates. It is sought to distinguish this case from the Chicago Bridge Case. If it can be distinguished, it must be on the following grounds: In the Blackbird Creek Case, arising in Delaware, the Schuylkill Bridge Case, in Pennsylvania, and all others since decided, following the decisions in those cases, it was held that Congress, under its authority to regulate commerce and establish post-roads, had power to control, for those purposes, the internal navigable waters of the various States; that as soon as Congress legislates in regard to any such navigable waters, its power becomes exclusive, and the States cannot afterward authorize any material obstruction to their navigation; but till Congress acts, the Legislature of any State has the power to authorize the obstruction of any navigable waters within its borders, by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse. It was held, with respect to the navigable waters of Delaware and Pennsylvania, that Congress had never acted, and, consequently, the legislation of these States authorizing the obstructions complained of was valid.

The question, therefore, is, has Congress acted with reference to the navigable waters of California, by legislating upon the subject, in such sense that its control has superseded the power of the State Legislature and become exclusive? If so, then the case is distinguishable from any of the cases, other than the Wheeling Bridge Case, before decided by the Supreme Court. If Congress has so acted, that legislation is found in the act admitting California into the Union, which act provides, "that *all* the navigable waters within the State *shall be common highways*, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." 9 Stat., 452, 453. How can the American river be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the State," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be *practically used as a highway*, and such capacity is wanting where there is an impassable barrier or obstruction. This provision is a law of Congress, and it is valid, not as a compact between the United States and the State of California, but as a law of Congress, passed by virtue of the constitutional power of Congress to regulate commerce among the States and with foreign nations, and to establish post-roads. Pollard's Lessee *v.* Hagan, 3 How., 224, 225, 229, 230; Wheeling Bridge Case, 13 Id., 566; Mining Debris

Case, 1 West Coast Rep., 212. What does this provision of the statute mean? Can there be any reason to suppose that Congress intended anything else than to make or continue the navigable waters of the State, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the State to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the act of admisson, but subsequently, after the admission of California into the Union "on an equal footing with the original States in all respects whatever," Congress had passed a separate, independent act, with no other provision in it, pro-
36 viding "that all the navigable waters within the State of California shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that Congress, by the passage of such an act, under the circumstances indicated, could have any other purpose than to take control of the navigable waters of the State for the purpose of preventing any interference with or obstruction to their navigability, or "so far as might be necessary to insure their free navigation?" Or would it be seriously doubted that Congress had acted upon the subject-matter within the meaning of the terms of the decisions in the Blackbird Creek and Schuylkill Bridge cases mentioned? If such would be the construction in an independent act passed subsequently to the admission of the State, it must be the construction of the same language as found in the act of admission. If such is not the purpose of this provision, it would be difficult, I think, to determine what the purpose is. Following the direct decision upon this point in the Wheeling Bridge Case, 13 How., 565, I had no difficulty in concurring with the district judge in the ruling that a similar provision in the act admitting Oregon into the Union constituted legislative action by Congress upon the subject-matter of such a character as to withdraw it from the jurisdiction of State legislation.

In the Chicago Bridge Case, *supra*, the court still recognizes the power of the National Government to control the navigable waters of the several States. It says: "The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States, which *are navigable in fact, so far as it may be necessary to insure free navigation,* where by themselves, or their connection with other waters, they form a continuous channel for commerce among the States or with foreign countries." 107 U. S., 682. The question, then, is, whether the provision quoted from the act of admission is legislation by which Congress takes control of the navigable waters of the State, "so far as it may be necessary to insure their free navigation;" and whether there can be a "common highway," or "free navigation," where the passage of steamers or other vessels is absolutely obstructed by impassable barriers thrown across the channels of waters otherwise navigable, in fact. In the case of the State of Illinois, neither the act authorizing the inhabitants to form a State Government, 3 Stat., 428, nor the resolution admitting the State into the Union, Id., 526,

contains the provision, or any provision of a character similar to that found in the acts admitting California and Oregon into the Union. Both the act and the resolution relating to Illinois are silent upon the subject, and I am not aware that there is any subsequent legislation on the subject affecting the *status* of Illinois. In the Chicago Bridge Case, the Supreme Court seems to regard the provision of the ordinance of 1787 as inoperative after the admission of Illinois as a State. Says the court: "Whatever limitation upon its powers as a Government, whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, *it ceased to have any operative force*, except as voluntarily adopted by her after she became a State of the Union. On her admission she became entitled to and possessed all the rights and dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States in all respects whatever.' 3 Stat., 536. Equality of constitutional right and power is a condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird creek, and Pennsylvania over the Schuylkill river." 107 U. S., 688, 689.

There being no legislation by Congress, then, assuming the control of the navigable waters of Illinois, there was nothing more to prevent legislation by the State in regard to the navigable waters of Illinois than there was to prevent legislation by the States of Delaware and Pennsylvania. But I do not understand it to be held or intimated that Congress cannot, by legislation in the interest of interstate commerce, take control of any one or all of the navigable waters either of Illinois, Delaware, or Pennsylvania. Only it has not yet done so. I suppose Congress might take control of any one navigable river by name, as the Sacramento, for the purpose of facilitating interstate commerce, or it might take control, generally, of all the navigable waters of any particular State, without reference to the waters of other States, and there might well be special reasons, making it desirable with reference to some particular waters, or some particular States, which are not applicable to other waters, or other States. I do not understand that special legislation as to particular rivers or particular States not applicable to others would affect the "constitutional right or power," or the equality of the States in any particular. All of the States are alike equally subject, at any and all times, when Congress sees fit to act, to the power of Congress to "regulate commerce among the States" and with foreign nations, and the power to "establish post-roads" within their several borders and over their several navigable waters. But the regulation of commerce on the waters of, and establishment of post-roads in, some States, before it is done on the waters of or in other States, does not affect their constitutional *status* of equality. Congress may take its own time and occasion to regulate the navigable waters of a State without affecting its constitutional condition of equality. I suppose Con-

gress might now, by an act duly passed, apply the provision in the acts of admission of Oregon and California to Illinois, Delaware, and Pennsylvania—to any one or all of them; and if it should do so, it would seem that there ought not to be any doubt that the object would be to take exclusive control for the benefit of commerce, and to suspend the power of regulation, or at least of obstruction and destruction, by the States. But until some legislation of the kind is had, those States concerning whose waters Congress has not legislated, under the decisions referred to, may themselves legislate upon the subject. If the provision in the California act of admission is legislation taking control of the navigable waters of the State for the benefit of commerce, then Congress has legislated in reference to the navigable waters of California, while it has not done so with reference to the navigable waters of Delaware, Pennsylvania, and Illinois; and, in this respect, California and Oregon stand upon a footing entirely different from that of those States, and the decisions as to them are inapplicable. The foregoing observations indicate the distinction, if any sound distinction there be, and it seems to me that there is, between this case, the Wallamet Iron Bridge Case, and the Wheeling Bridge Case, and those other cases cited, already decided by the Supreme Court. If the distinction is not sound, then it appears to me that the Wheeling Bridge Case must also be regarded as
37 overruled, although the Supreme Court does not expressly indicate any intention to overrule it.

There is an intimation, however, in the opinion in the Chicago Bridge Case, not necessary to the decision of the case upon the other views expressed by the court, that the provision of the ordinance of 1787, corresponding to the provision in question in the acts of admission of California and Oregon, if in force, would not affect the question. (107 U. S., 689.) If this be so, then the distinction referred to is of no practical consequence. But the bridges and other obstructions referred to as illustrations, following this intimation, were all *draw*-bridges, or other *partial* obstructions, while the bridge now in question is an absolute, unqualified, entire obstruction to the navigation of the river. In view of these intimations and other general observations in the opinion of the court, and not feeling quite certain as to how far the Supreme Court intended to go on the questions, and not wishing even to seem to disregard the decisions of the Supreme Court, I shall, for the purposes of this case, sustain the demurrer and dismiss the bill. The bill presents the case fully, and it will be much better for all parties to have the effect of the provision of the act of admission determined now before going to the expense of a trial. As the complainant has already submitted to the obstruction for many years, the right, I think, should be finally determined on appeal before an injunction should be decreed. The Supreme Court does not appear to me to have considered carefully, or finally determined, what the purpose and effect of the provision in question in the act of admission is. It must have some object, and if that object be not to protect and preserve the navigability of those waters against obstructions equivalent to destruction by authority of the State, what was the purpose? The fact that the pro-

vision is in the act of admission, instead of in subsequent independent legislation, cannot affect its construction or its force and effect. But for the observations in the Chicago Bridge Case, which I think unnecessary to the decision, and believing that Congress had acted upon the subject, I should have followed the ruling of the circuit court in the Wallamet Bridge Case, and what I understand to be the decision in the Wheeling Bridge Case, and overruled the demurrer. I do not wish to be regarded as having changed my own views upon the rulings in the Wallamet Bridge Case. I still think it similar to the Wheeling Bridge Case, and distinguishable from any other cases hitherto decided by the Supreme Court brought to my attention. I still think the decree in that case correct, on the ground that Congress has acted upon the subject; also on other grounds than the point discussed in this case. But the case will be appealed, and if the circuit court was wrong, the rights of the parties will be finally settled by the Supreme Court. I only write this opinion to indicate upon what distinction, if any, the case I suppose should be taken out of the decision of the Chicago Bridge Case, with the hope that the attention of the Supreme Court will be specially directed to that supposed distinction.

Endorsed: Read in open court March 3, 1884. L. S. B. Sawyer, clerk. By F. D. Moncton, deputy clerk.

38 *Order Allowing Appeal.*

At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the tenth day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Present: the Honorable Lorenzo Sawyer, circuit judge.

JOHN T. CARDWELL
vs.
THE AMERICAN RIVER BRIDGE COMPANY.

On motion of J. J. Scrivner, Esq., solicitor for complainant, it is ordered that an appeal from the decision rendered and the decree filed and entered in the above-entitled cause on the third day of March, A. D. 1884, being a day in the February term, A. D. 1884, of said circuit court, to the Supreme Court of the United States,
39 be, and the same is hereby, allowed, and that a certified transcript of the pleadings, depositions, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States, upon the appellant giving a bond in the sum of five hundred dollars.

40 *Bond on Appeal.*

In the Supreme Court of the United States.

JOHN T. CARDWELL, Appellant,
vs.
THE AMERICAN RIVER BRIDGE COMPANY, Appellee.

Know all men by these presents, that we, William Giselman, F. W. Eaton, are held and firmly bound unto The American River Bridge Company, said appellee, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The American River Bridge Company, its successors, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 10th day of March, A. D. 1884.

41 Whereas the above-named John T. Cardwell has taken an appeal to the Supreme Court of the United States to reverse the decision rendered and the decree filed and entered in the above-entitled cause by the circuit court of the United States of America of the ninth judicial circuit in and for the district of California:

Now, therefore, the condition of this obligation is such, that if the above-named John T. Cardwell shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. W. EATON. [SEAL.]
WM. GISELMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

42 UNITED STATES OF AMERICA, }
District of California, } *ss:*

William Giselman and F. W. Eaton, being duly sworn, each for himself, says: That he a resident and freeholder within said district of California, and that he is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all his just debts and liabilities.

F. W. EATON. [SEAL.]
WM. GISELMAN. [SEAL.]

Subscribed and sworn to before me, this 10th day of March, A. D. 1884.

L. S. B. SAWYER,
Commissioner of U. S. Circuit Court, Dist. of Cal.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. L. S. B. Sawyer,
43 clerk. Approved. Lorenzo Sawyer. Filed March 10, 1884. L. S. B. Sawyer, clerk.

44 In the Circuit Court of the United States, District of California.

JOHN T. CARDWELL *vs.* THE AMERICAN RIVER BRIDGE COMPANY.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing forty-three written and printed pages, numbered from 1 to 43, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said court.

Attest my hand and the seal of said circuit court, this 19th day of April, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

45 UNITED STATES OF AMERICA, *ss:*

To The American River Bridge Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1884, pursuant to an order granting an appeal to said Supreme Court, made and entered by the circuit court of the United States for the district of California, in the cause entitled John T. Cardwell against The American River Bridge Company, to show cause, if any there be, why the decree in the said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, circuit judge of the United States for the district of California, this 10th day of March, A. D. 1884, and of the Independence of the United States the 108th.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

46 [Endorsed:] United States Supreme Court. John T. Cardwell, appellant, *vs.* The American River Bridge Company, appellee. Citation. Service of a copy of the within citation is hereby acknowledged this 13 day of March, 1884. H. O. & W. H. Beatty, solicitors for defendant. Filed March 13, 1884. L. S. B. Sawyer, clerk.

Endorsed on cover: California C. C. U. S. No. 855. John T. Cardwell, appellant, *vs.* The American River Bridge Company. Filed 2nd June, 1884.

113-205

In the Circuit Court of the United States, District of California.

JOHN T. CARDWELL, Complainant & Appellant,
vs.
THE AMERICAN RIVER BRIDGE COMPANY, Defendant & Respondent.

This cause having come on regularly to be heard on the demurrer of the defendants filed in said cause, and the court, after hearing the argument of counsel upon said demurrer, having duly entered and recorded its order sustaining said demurrer and dismissing the complainant's bill of complaint herein:

Now, therefore, the said complainant assigns and specifies the following errors of law in making said decree, to wit:

I.

The court erred in sustaining said defendants' demurrer to complainant's said bill of complaint and in dismissing said bill.

II.

The court erred in sustaining said defendants' demurrer.

III.

The court erred in entering its decree against said complainant and in favor of said defendants.

IV.

The court erred in holding that the Legislature of the State of California had authority to authorize the construction of a bridge or bridges without any draw or other means of passing same across a river navigable in fact to the ocean, whereby the navigation of such river is wholly obstructed.

V.

The court erred in holding that the provision in the act of Congress admitting California into the Union, "that all the navigable waters within the State of California shall be common highways, and forever free as well to the inhabitants of said States as to the citizens of the United States, without any tax, impost, or duty therefor," is not legislation by Congress whereby the control of the navigable waters of the State has been taken by Congress for the purpose of preventing any interference with or obstruction by the State to their navigability, or so far as may be necessary to insure their free navigation.

Wherefore complainant prays that said decree of said circuit court sustaining said demurrer and dismissing said bill of complaint be

reversed, and that said cause be remanded to said circuit court for trial.

J. J. SCRIVNER,
Solicitor for Complainant and Appellant.

JOHN L. BOONE,
Of Counsel.

(Endorsed:) Filed Dec'r 24, 1884. L. S. B. Sawyer, clerk.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of an assignment of error filed December 24, 1884, in the therein entitled cause.

Attest my hand and seal of said circuit court, this 24th day of December, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON, *Deputy Clerk.*

[Endorsed:] No. 855. John T. Cardwell, appellant, *vs.* The American River Bridge Company, respondent. Assignment of errors. J. J. Scrivner, solicitor for appellant. John L. Boone, of counsel.

113-205

DEC 31 1884

JAMES H. McKENNEY,

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

JOHN T. CARDWELL,

Complainant and Appellant,

vs.

THE AMERICAN RIVER BRIDGE CO.,

Defendant and Respondent

APPELLANT'S BRIEF.

J. J. SCRIVNER,

Solicitor for Complainant and Appellant.

JOHN L. BOONE,

Of Counsel

Filed ..... *A. D. 1884.*

..... *Clerk.*

By ..... *Deputy Clerk.*

SAN FRANCISCO:

GEO. SPAULDING & CO., GENERAL BOOK AND JOB PRINTERS,

414 CLAY STREET.

reversed, and that said cause be remanded to said circuit court for trial.

J. J. SCRIVNER,
Solicitor for Complainant and Appellant.

JOHN L. BOONE,
Of Counsel.

(Endorsed:) Filed Dec'r 24, 1884. L. S. B. Sawyer, clerk.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of an assignment of error filed December 24, 1884, in the therein entitled cause.

Attest my hand and seal of said circuit court, this 24th day of December, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON, *Deputy Clerk.*

[Endorsed:] No. 855. John T. Cardwell, appellant, *vs.* The American River Bridge Company, respondent. Assignment of errors. J. J. Scrivner, solicitor for appellant. John L. Boone, of counsel

113-203

FILED
DEC 31 1884
JAMES H. McKENNEY

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

JOHN T. CARDWELL,

Complainant and Appellant,

vs.

THE AMERICAN RIVER BRIDGE CO.,

Defendant and Respondent

APPELLANT'S BRIEF.

J. J. SCRIVNER,
Solicitor for Complainant and Appellant.

JOHN L. BOONE,
Of Counsel

Filed ..... *A. D. 1884.*

..... *Clerk.*

By ..... *Deputy Clerk.*

SAN FRANCISCO:
GEO. SPAULDING & CO., GENERAL BOOK AND JOB PRINTERS,
414 CLAY STREET.

In the Supreme Court

OF THE

UNITED STATES.

JOHN T. CARDWELL,
Complainant and Appellant,

vs.

THE AMERICAN RIVER BRIDGE COMPANY,
Defendant and Respondent.

Appellant's Brief.

This case comes before this Court upon an appeal from a final decree entered in U. S. Circuit Court for the District of California, sustaining the defendant's demurrer to the Bill of Complaint, and dismissing the same.

Facts of the Case.

The Bill alleges that the American River is navigable in fact for steamboats and barges for thirty miles from its mouth to Folsom; that com-

plainant is the owner of several thousand acres of land bordering for a long distance on said river, below Folsom; that he raises on said land several thousand tons of grain yearly; that he is the owner of a steamboat and other vessels by which he could and would ship his grain down the river but for the obstruction interposed by the bridge in question; that there are large deposits of cobble stones in the bed and on the borders of the river on his land which have a large market value in San Francisco for paving and other purposes, which, but for the said obstructions, he could ship by his vessels and sell at a large profit, whereas the expense of sending them by rail and other means open to him, is such that he is unable to dispose of them at all, or so as to make it profitable; that in pursuance of the authority of an Act of the Legislature of California, the defendant has erected a low bridge without any draw in it, or other means of passing the bridge, by means of which the navigation of the river by complainant's steam and other boats is wholly obstructed to his damage, of many thousand dollars every year. The complainant asks a decree either compelling the defendant to remove the bridge, or else to place a draw in it, so as to permit the passage of steamers and other vessels capable of navigating the river.

Points and Authorities.

I. The controlling, if not the sole material issue in the case, involves the construction of Section 3 of the Act of September 9th, 1850, admitting the State of California into the Union, which so far as applicable, reads as follows: "All the nav- "igable waters within the said State shall be com- "mon highways and forever free, as to the inhab- "itants of said State, as to the citizens of the "United States, without any tax, impost or duty "therefor."

The appellant contends that the effect of this Congressional legislation is to withdraw the whole subject matter from the jurisdiction of the State, and that any and all enactments of the State Legislature attempting to authorize the obstruction of the navigable waters of, or within the State, are void, for the reason that the control of such navigable waters is expressly conferred upon Congress. Sec. 8, Art. 1 of the Federal Constitution, which reads as follows: "Congress shall have "power to regulate commerce among the several "States and with the Indian tribes * * * and "to make all laws which shall be necessary and "proper for carrying into execution the fore- "going powers." Congress having acted upon the subject matter by declaring the navigable wa-

ters of the State free and public highways, the State Legislature has no power to authorize the obstructing of such rivers.

After argument of this question in the Court below, his Honor, Judge Sawyer, filed a written opinion, which we here insert in *extenso*, as a part of our brief, to-wit:

"This case is clearly within the rule as laid down in the Waliamet Bridge Case, 7 Saw. 127. If that case can be sustained in the broad terms of the rule stated, then the demurrer in this case should be overruled. Since that decision was rendered the Supreme Court of the United States has decided the case of *Escanaba Co.* vs. *Chicago*, 107 U. S. 679, which defendant insists overrules the principle announced in the Wallamet Bridge Case; that under the clause of the Act admitting Oregon into the Union, the State has no power to authorize the construction of bridges over the navigable waters of the State which shall materially obstruct their navigation. It must be admitted, I think, that there is language in the opinion that favors that view; and I am by no means certain that the Court did not intend to go as far as its broadest language indicates. It is sought to distinguish this case from the Chicago Bridge Case. If it can be distinguished, it must be on the following

grounds: In the Blackbird Creek Case, arising in Delaware, the Schuylkill Bridge Case, in Pennsylvania, and all others since decided, following the decisions in those cases, it was held that Congress, under its authority to regulate commerce and establish post-roads, had power to control, for those purposes, the internal navigable waters of the various States; that as soon as Congress legislates in regard to any such navigable waters, its power becomes exclusive, and the States cannot afterward authorize any material obstruction to their navigation; but till Congress acts, the Legislature of any State has the power to authorize the obstruction of any navigable waters within its borders, by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse. It was held, with respect to the navigable waters of Delaware and Pennsylvania, that Congress had never acted, and, consequently, the legislation of these States authorizing the obstructions complained of was valid.

The question, therefore, is, has Congress acted with reference to the navigable waters of California, by legislating upon the subject, in such sense that its control has superseded the power of the State Legislature and become exclusive? If so, then the case is distinguishable from any of the cases, other than the Wheeling Bridge Case, be-

fore decided by the Supreme Court. If Congress has so acted, that legislation is found in the Act admitting California into the Union, which Act provides, "that *all* the navigable waters within the State *shall be common highways*, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor" — 9 Stat. 452, 453. How can the American River be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the State," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be *practically used as a highway*, and such capacity is wanting where there is an impassable barrier or obstruction. "Now, an obstructed navigation cannot be said to be free." (Wheeling Bridge Case, 13 How. 565.) This provision is a law of Congress, and it is valid, not as a compact between the United States and the State of California, but as a law of Congress, passed by virtue of the constitutional power of Congress to regulate commerce among the States and with foreign nations, and to establish post-roads: Pollard's Lessee *vs.* Hagan, 3 How. 224, 225, 229, 230; Wheeling Bridge Case, 13 Id. 566; Mining Debris Case, 1 West Coast Rep. 212. What does

this provision of the statute mean? Can there be any reason to suppose that Congress intended anything else than to make or continue the navigable waters of the State, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the State to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the Act of Admission, but subsequently, after the admission of California into the Union "on an equal footing with the original States in all respects whatever," Congress had passed a separate, independent Act, with no other provision in it, providing "that all the navigable waters within the State of California shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that Congress, by the passage of such an Act, under the circumstances indicated, could have any other purpose than to take control of the navigable waters of the State for the purpose of preventing any interference with, or obstruction to, their navigability, or "so far as might be necessary to insure their free navigation?" Or would it be seriously doubted, that Congress had acted upon the subject-matter within the meaning of the terms of the decisions in the Blackbird Creek and Schuylkill Bridge cases mentioned? If such

would be the construction in an independent Act passed subsequently to the admission of the State, it must be the construction of the same language as found in the Act of Admission. If such is not the purpose of this provision, it would be difficult, I think, to determine what the purpose is. Following the direct decision upon this point in the Wheeling Bridge Case, 13 How. 565, I had no difficulty in concurring with the District Judge in the ruling that a similar provision in the Act admitting Oregon into the Union constituted legislative action by Congress upon the subject-matter, of such a character as to withdraw it from the jurisdiction of State legislation.

In the Chicago Bridge Case, *supra*, the Court still recognizes the power of the national government to control the navigable waters of the several States. It says: "The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States, which *are navigable in fact so far as it may be necessary to insure free navigation*, where by themselves, or their connection with other waters, they form a continuous channel for commerce among the States or with foreign countries." 107 U. S., 682. The question, then, is, whether the provision quoted from the act of admission is legislation by which Congress takes control of the navigable waters of the State,

"so far as it may be necessary to insure their free navigation;" and whether there can be a "common highway," or "free navigation," where the passage of steamers or other vessels is absolutely obstructed by impassable barriers thrown across the channels of waters otherwise navigable, in fact. In the case of the State of Illinois, neither the Act authorizing the inhabitants to form a State government, 3 Stat. 428, nor the resolution admitting the State into the Union, Id. 526, contains the provision, or any provision of a character similar to that found in the Acts admitting California and Oregon into the Union. Both the Act and the Resolutions relating to Illinois are silent upon the subject, and I am not aware that there is any subsequent legislation on the subject affecting the *status* of Illinois. In the Chicago Bridge Case, the Supreme Court seems to regard the provision of the Ordinance of 1787 as inoperative after the admission of Illinois as a State. Says the Court: "Whatever limitation upon its powers as a government, whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, *it ceased to have any operative force*, except as voluntarily adopted by her after she became a State of the Union. On her admission she became entitled to and possessed all the rights and dominion and sovereignty which belonged to the original States. She was admitted, and could be

admitted, only on the same footing with them. The language of the Resolution admitting her is 'on an equal footing with the original States in all respects whatever.' 3 Stat. 536. Equality of constitutional right and power is a condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within their limits that Delaware exercised over Blackbird creek, and Pennsylvania over the Schuylkill River." 107 U. S. 688, 689.

There being no legislation by Congress, then, assuming the control of the navigable waters of Illinois, there was nothing more to prevent legislation by the State in regard to the navigable waters of Illinois than there was to prevent legislation by the States of Delaware and Pennsylvania. But I do not understand it to be held, or intimated, that Congress can not, by legislation in the interest of interstate commerce, take control of any one, or all of the navigable waters, either of Illinois, Delaware or Pennsylvania. Only it has not yet done so. I suppose Congress might take control of any one navigable river by name, as the Sacramento, for the purpose of facilitating interstate commerce, or it might take control, generally, of all the navigable waters of any particular State, without reference to the waters of other States, and there might well be special rea-

sons, making it desirable with reference to some particular waters, or some particular States, which are not applicable to other waters, or other States. I do not understand that special legislation as to particular rivers or particular States, not applicable to others, would affect the "constitutional right or power," or the equality of the States in any particular. All of the States are alike equally subject, at any and all times, when Congress sees fit to act, to the power of Congress to "regulate commerce among the States," and with foreign nations, and the power to "establish post-roads" within their several borders and over their several navigable waters. But the regulations of commerce on the waters of, and establishment of post-roads in some States, before it is done on the waters of or in other States, does not affect their constitutional *status* of equality. Congress may take its own time and occasion to regulate the navigable waters of a State without affecting its constitutional condition of equality. I suppose Congress might now, by an Act duly passed, apply the provision in the Acts of admission of Oregon and California to Illinois, Delaware and Pennsylvania—to any one or all of them; and if it should do so, it would seem that there ought not to be any doubt that the object would be to take exclusive control for the benefit of commerce, and to suspend the power of regulation, or

at least of obstruction and destruction, by the States. But until some legislation of the kind is had, those States concerning whose waters Congress has not legislated, under the decisions referred to, may themselves legislate upon the subject. If the provision in the California Act of Admission is legislation taking control of the navigable waters of the State for the benefit of commerce, then Congress has legislated in reference to the navigable waters of California, while it has not done so with reference to the navigable waters of Delaware, Pennsylvania and Illinois; and, in this respect, California and Oregon stand upon a footing entirely different from that of those States, and the decisions as to them are inapplicable.

The bridge in question, it must be remembered, is a solid, low bridge, without any draw, and a complete, absolute, unmitigated obstruction to the navigation of the river. It utterly destroys its navigability at the point of its location. If the provision in question, in the Act of Admission, cannot be regarded as legislation, withdrawing the navigable waters of the State from the power of the State, to thus obstruct their navigation, and inhibiting such obstruction, then there is nothing in the Constitution and Laws of the United States, as they now stand, to prevent the State from authorizing the building of a solid,

low, impassable bridge across the Sacramento river at its mouth; or across the Straits of Carquinez, or even across the Golden Gate, and thereby prevent any vessel from entering the Bay of San Francisco, or any of the navigable bays and rivers connected therewith. The foregoing observations indicate the distinction, if any sound distinction there be, and it seems to me there is, between this case, the Wallamet Iron Bridge Case and the Wheeling Bridge Case, and those other cases cited, already decided by the Supreme Court. If the distinction is not sound, then it appears to me that the Wheeling Bridge Case must also be regarded as overruled, although the Supreme Court does not expressly indicate any intention to overrule it.

There is an intimation, however, in the opinion in the Chicago Bridge Case, not necessary to the decision of the case upon the other views expressed by the Court, that the provision of the Ordinance of 1787, corresponding to the provision in question in the Acts of admission of California and Oregon, if in force, would not effect the question. 107 U. S. 689. If this be so, then the distinction referred to is of no practical consequence. But the bridges, and other obstructions referred to as illustrations following this intimation, were all *draw*-bridges, or other *partial* obstructions, while the bridge now in question is an absolute, un-

qualified, entire obstruction to the navigation of the river. In view of these intimations and other general observations in the opinion of the Court, and not feeling quite certain as to how far the Supreme Court intended to go on these questions, and not wishing even to seem to disregard the decisions of the Supreme Court, I shall, for the purposes of this case, sustain the demurrer and dismiss the bill. The bill presents the case fully, and it will be much better for all parties to have the effect of the provision of the act of admission determined now before going to the expense of a trial. As the complainant has already submitted to the obstruction for many years, the right, I think, should be finally determined on appeal before an injuction should be decreed. The Supreme Court does not appear to me to have considered carefully, or finally determined, what the purpose and effect of the provision in question in the act of admission is. It must have some object, and if that object be not to protect and preserve the navigability of those waters against obstructions equivalent to destruction by authority of the State, what was the purpose? The fact that the provision is in the act of admission, instead of in subsequent independent legislation, cannot affect its construction, or its force and effect. But for the observations in the Chicago Bridge Case, which I think unnecessary to the decision,

and believing that Congress had acted upon the subject, I should have followed the ruling of the Circuit Court in the Wallamet Bridge Case, and what I understand to be the decision in the Wheeling Bridge Case, and overruled the demurrer. While I do not doubt the correctness of the decision in the Chicago Bridge Case, and those like it, I do not wish to be regarded as having changed my own views upon the rulings in the Wallamet Bridge Case. I still think it similar to the Wheeling Bridge Case, and distinguishable from any other cases hitherto decided by the Supreme Court brought to my attention. I still think the decree in that case correct, on the ground that Congress has acted upon the subject, also on other grounds than the point discussed in this case; the draw in my judgment being wholly insufficient, in view of the location of the bridge, the direction and force of the currents, etc. In my judgment, the proposed bridge would not comply with the Statute of Oregon authorizing its erection with respect to the obstructions of the navigation of the river. But the case will be appealed, and if the Circuit Court was wrong, the rights of the parties will be finally settled by the Supreme Court. I only write this opinion to indicate upon what distinction, if any, the case I suppose should be taken out of the decision of the Chicago Bridge Case, with the hope that the

attention of the Supreme Court will be specially directed to that supposed distinction, and the effect, if any it has, of the provision in question in the act of admission be definitely and authoritatively determined.

The precise question now under consideration was also fully considered and passed upon by Judges Sawyer and Deady in the case of *Hatch* vs. *Wallamet Iron Bridge Co.*, upon a motion for a preliminary injunction, where our view was fully sustained. That part of the opinion bearing upon this question is reported in the 7th Sawyer, pp. 141 to 145 inclusive.

Subsequently, in another branch of the same case, Judge Deady filed an opinion which contains a very able and exhaustive review of the whole question.

See *Wallamet Bridge Co.* vs. *Hatch*, 19 Fed. Rep., p. 347.

Judge Deady there says the argument of counsel for the corporation, in support of this conclusion, is in substance and effect—

(1.) The Wallamet River is wholly within the State of Oregon, and therefore not within the power of Congress to regulate or conserve its use as a vehicle or means of interstate or foreign commerce.

Now, this proposition has no countenance or support in either reason or authority. In fact, and for all the purposes of commerce, the Wallamet River is a part of the Columbia, of which it is an important affluant or branch. Together, they form, or help to form, a continuous highway between Oregon and the other Pacific States and Territories and foreign countries, therefore, in contemplation of the constitutional grant of power to Congress over the subject of commerce between these States and countries, and for the purpose of regulating the same, it is the property of the nation—a navigable water of the United States.

The authorities from *Gibbon* vs. *Ogden*, 9 Whea., 1, to *Miller* vs. *City of New York*, 3 S. C. Rep., 234—a period of sixty years—are uniform and unqualified on this point. In *Gilman* vs. *Philadelphia*, 3 Wall., 724, Mr. Justice Swayne says: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States, or otherwise; to remove such

obstructions when they exist; and to provide, by such sanctions as they may deem proper, against occurrences of the evil and for the punishment of the offenders."

In the Daniel Ball, 10 Wall., 557, it was held that Grand River, a comparatively insignificant water lying wholly within the State of Michigan, but emptying into the lake of that name, and only navigable forty miles from its mouth to Grand Rapids, for a boat of 123 tons burden, is a navigable water of the United States and subject to its control as a highway of commerce, interstate and foreign, on account of its junction with Lake Michigan, of which it forms a part. In delivering the opinion of the Court, Mr. Justice Field said (p. 563), the common law test of the navigability of a river—the ebb and flow of the tide therein—does not apply to the rivers of this country. "Those rivers must be regarded as public, navigable rivers in law, which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States,

when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

In *Escanaba Co.* vs. *Chicago*, 107, U. S., 678, it was held that the Chicago River, lying wholly within the City of Chicago, and a little local stream compared with the Wallamet, is a navigable water of the United States, because it leads into Lake Michigan; and in *Miller* vs. *The City of New York*, *supra*, the same rule was applied to the East River, a water wholly within the State of New York, but connecting the Hudson and the Sound, and therefore a highway of interstate and foreign commerce.

Mr. Justice Field delivered the opinion of the Court in both these cases, and referred to and relied on the above citations from the opinion in the case of the Daniel Ball.

See also

Hatch vs. *Willamet I. B. Co.*, 7 Saw., 131.

(2). That if Congress has the power to regulate the navigation of the Willamet river, as a navigable water of the United States, it cannot do so by a special act, as the Statute of 1850, applicable alone to the waters of Oregon, but

only by a general law, which shall operate uniformly upon all such waters in the United States.

And this proposition is also without a shadow of foundation in either reason or authority. It is rather late in the day to question the right of Congress to exercise its authority over the navigable waters of the United States specially—from time to time and place to place—as it may consider the exigencies of commerce to require. Congress has been making appropriations from time to time, for years, to maintain and improve the navigation of the Wallamet river, but on this theory of its power, all such Acts are void and usurpations of power, unless a like provision was made at the same time for every other navigable water of the United States.

In the last fifteen or twenty years Congress has legislated largely on the subject of bridges over the Ohio, Mississippi and Missouri rivers, prescribing when, where and how they may or may not be built (*Hatch* vs. *Wallamet Iron Bridge Company*, 7 Saw., 138); and although important interests have been unfavorably affected by such legislation, it was never before suggested that it was invalid for want of such uniformity. It has also legislated specially upon the subject of a bridge over the East river in New York; and although the legality of this structure has since been contested from the Circuit to the Supreme

Court of the United States (*Miller* vs. *The City of New York*, *supra*), no one appears to have ever questioned the legality of the Act of Congress authorizing its erection and prescribing its character and location, on this or any other ground.

The vice of the argument in support of each of these propositions is the assumption that the navigable waters within a State are exclusively the waters of such State, and therefore Congress has no power over them; or, if it may legislate concerning them in the interest of commerce, it can only do so by such general legislation as shall limit or effect the power of each State in the premises equally, so as to preserve, as it is said, its "equal footing in the Union with the other States."

But, as we have seen, this theory of the matter is founded upon a total misaprehension of the relation of the National and State Governments to the subject and to one another. For the purposes of commerce and the exercise of the power of Congress over that subject, every navigable water in the Union which of itself, or by means of its connections, forms a continuous highway for interstate or foreign commerce, is primarily the navigable water of the United States, over which it has the same power for the purposes of such commerce as if it was wholly in a territory or the District of Columbia. When and how far Con-

gress will exercise this power is a question for its determination in each case, looking to the public convenience and general welfare. In the exercise of this, as in the case of other congressional powers, no such thing as uniformity of action is desirable or attainable; and it is also to be considered, that what is lawful may not always be expedient.

(3.) That Congress has no power, in the admission of a State into the Union, to impose, by compact or otherwise, any limitation or restriction on its powers or rights as a State, under the Constitution; and therefore the act of 1859, admitting Oregon into the Union, so far as it attempts to restrict its power over the navigable waters within its limits, is void and of no effect.

But admitting the premises, the conclusion does not follow.

Although the grant of power to Congress to admit new States into this Union (U. S. Con., Art. IV, Sec. 3) is unqualified, yet it is well established by the Supreme Court, that Congress cannot admit a State upon any other than an equal footing with the other States therein; and therefore cannot, as a consideration of such admission, make any valid compact or enactment which shall deny to such State within its limits the municipal powers common to the others.

Pollard vs. *Hagan*, 3 How., 233.
Permoli vs. *New Orleans*, Id., 609.
Strader vs. *Graham*, 10 How., 92.

The Act of 1859, admitting Oregon into the Union, contains (Sec. 4) four propositions to the people of Oregon concerning the public lands therein, which, in consideration of a valuable grant of public land, they accepted by an Act of the Legislature of June 3, 1859. Or. Laws, 101. But the admission of the State was not conditioned upon the acceptance of these propositions; and in fact preceded it. Nor did the State in accepting it undertake to relinquish any power or right that belonged to it, as a State of the Union, unless it is the right to tax "non-resident proprietors" higher than "residents." Therefore this portion of the Act is valid, without reference to such acceptance, as a congressional enactment respecting the disposition of the public lands in Oregon. (U. S. Con., Art. IV., Sec. 3.)

Pollard vs. *Hagan*, 3 How., 224.

But the clause in Sec. 2 of the Act of 1859, declaring the navigable waters in Oregon to be "common highways," is no part of these propositions and does not even purport to derive its force or vitality from this or any compact, but solely from the fact that it is an Act of Congress, duly passed by it in pursuance of its power to

regulate commerce. The admission of the State and the enactment of the regulation are simply coincident in point of time. The one was admitted unconditionally and the other enacted absolutely; and the regulation might have been enacted on the day before or the day after the admission, or at any time since, as well as then.

But even if it had been made a condition of the admission of the State into the Union, that the people thereof should consent to this regulation it would nevertheless be valid, as an Act of Congress, because that body had the power to pass it without their consent. Their consent would add nothing to its force or validity.

In the leading case on this subject of *Pollard* vs. *Hagan*, *supra*, the Court say (p. 229) of the following declaration contained in the compact entered into between the United States and Alabama, upon the admission of the latter into the Union, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of the said State and the United States, without any tax, duty, impost or toll therefor, imposed by the said State" (3 Stat., 492), that it was nothing more than a regulation of commerce, and as such, a valid and binding Act of Congress, without reference to the supposed compact or the consent of the people of Alabama.

(4.) That the provision in Sec. 2 of the Act of 1859—"all the navigable waters of said State (Oregon) shall be common highways and forever free, as well to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost or toll therefor"—was not intended, and should not be construed as a restriction or limitation on the power of the State to impede and obstruct the navigation of the Willamet river, at its pleasure, but only on its power to impose a toll upon any citizen of the United States on account of such navigation.

This clause had its origin in the fourth of the articles of the compact of the ordinance of 1787, for the government of the northwest teritory, in which it was provided that "The navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor;" and has been applied to the States admitted to the Union since the formation of the Constitution, and formed out of territory other than that included in the ordinance, it being generally supposed until a comparatively late day, that these articles of compact, and particularly the clause

in question, continued in force in the States formed out of such territory; except, so far as altered by "common consent."

Straden vs. *Graham*, 10 How., 97, McLean & Catyn, J. J.

Palmer vs. *Commissioners of Cuyahoga County*, 4 McLean, 226.

Columbus Ins. Co. vs. *Cortinius*, 6 McLean, 209.

It is admitted that the provision does prohibit this State from imposing any tax or toll on any citizen of the United States on account of the navigation of the river. But the authority of the National Government to restrain the State in this particular is no clearer than it is to prevent the State from authorizing or causing obstructions to the navigation of the river, that may as effectually deprive the citizen of the United States of its use as a highway as any tax or toll could.

Counsel for the plaintiff herein contend that the words "common highways forever free," taken in connection with the rest of the sentence, show that the paramount purpose of this legislation, "was to prevent any discrimination between the citizens of the United States," in the imposition of tolls on account of the navigation of the river. But there is no ground for this construction, for plainly the clause does not rest with the prohibi-

tion of discrimination in the imposition of such tolls, but goes further, and prohibits them all together, as well in the case of the citizens of the State as of the United States.

But the clause contains two distinct provisions —the one an absolute prohibition against the imposition of tolls for the navigation of the river; and the other, a declaration that the river shall remain a "common highway" for the use of all the citizens of the United States. The two things are separate and distinct; and one is not to be considered the mere adjunct or amplification of the other, because it is found in the same sentence. The maxim—*Noscitur a sociis*—does not apply. And if either provision can be considered as subordinate to the other, it is the one against tolls. A highway is a public way upon which all persons have a right to pass; and a public river is such a way, since it is open to all the king's subjects. Rap. and Law, L. D.; Highway, 2 Smith's L. C., 175.

A Declaration or Act of the Congress of the United States, that a navigable water thereof shall be a "common highway," imports, *ex vi termini*, that such water shall not be closed up or obstructed by dams, booms, bridges or otherwise, so as to materially impede or hinder the navigation of the same. And being a highway, no toll can be charged for travel thereon, except by con-

sent of the sovereign power which declared and made it such—the Congress of the United States — and they have forbidden it to be done. The plain purport and effect of the statute is this: (1) The Wallamet river is declared and made a "common highway" for the use of all the citizens of the United States; and (2), It shall be a "free" highway, upon which no toll, tax, or impost shall be charged. Being a "common highway," it is open to all citizens; and being also "free," it is open to them without toll or tax. From these premises, the conclusion follows that any obstruction to the navigation of this river, which materially impairs its use as a "common highway," is contrary to the Act of Congress, and, therefore illegal, whether authorized by the Legislature of the State or not. It also follows, that a case involving the question whether any bridge or other structure is such an obstruction, is a case arising under a law of the United States, and, therefore, within the jurisdiction of this Court. Act of 1875, 18 Stat., 470.

The Court then had jurisdiction to hear and decide the question whether this bridge is, or would be, such an obstruction to the use of this highway, as is forbidden by the Act of Congress. Whether it properly decided the question or not is a matter depending upon the circumstances of the case, as disclosed by the evidence, and cannot be con-

sidered in this proceeding. The way to determine that, is by an appeal from the final decree in the original case, to the Supreme Court, where the whole question can be considered on its merits.

And in this connection it should be remembered that the Court did not decide that the Act of 1859 prohibited the erection of *any* bridge across the Wallamet. It prohibits, of course, the erection of a low, solid bridge, for that would be an impassable barrier—a complete closing of the highway. And it is equally certain that it does not prohibit the erection of a high, suspension bridge under which vessels navigating the river might pass without hindrance or delay. Neither does it prohibit a low bridge, properly constructed with a good and sufficient draw, through which vessels may pass without unnecessary danger or delay—the commerce, size and condition of the river, as well as the state of the art of such bridge building, being taken into consideration. It is well known that all highways, whether of land or water, are subject to be crossed by other highways. The commerce of the country cannot be conducted on parallel lines. But where and in what manner such crossing shall be made or allowed depends largely upon the particular circumstances of each case. *Hatch* vs. *Wallamet Iron Bridge Co.*, 7 Saw., 136.

But the Court found upon the evidence that all

the circumstances considered the draw of the proposed bridge was altogether inadequate; that it ought to be at least 150 feet wide on either side of the pivot pier, as provided in the Act of Congress of June 23, 1874 (18 Stat., 281), authorizing the Oregon & California Railway Company to bridge the river at this place; and therefore it was a material as well as needless obstruction to the navigation of the river, causing danger and delay to the passage of vessels thereon.

Neither did the Court hold that such a bridge was even authorized by the Act of the Legislature of October 18, 1878. That Act requires not only that the bridge shall have a draw of not less than 100 feet in width, but that it shall be "so constructed and maintained, as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of said vessels through said bridge."

Upon this point the conclusion of the Court was that the Legislature did not intend to declare that a draw of only 100 feet in width is sufficient or to authorize the construction of a bridge otherwise than with a draw sufficient for the easy and safe passage of vessels, whether that must be one or two hundred feet in width; but that if it did, the Act was invalid, because contrary to the

Act of Congress, which on this point is the supreme law of the land.

Hatch vs. *Willamet I. B. Co.*,7 Saw., 137.

And in this connection the Court is reminded by counsel for the plaintiff herein, "that it is a delicate duty for a Court to declare an Act of the Legislature invalid." Of course, the Court will not do so unless the conflict between it and the Act of Congress is plain. And for this reason the Act of the Legislature is to be construed, if it reasonably can, so as to prevent such conflict and make it harmonize with supreme law.

But really it is well to remember, in a case like this, that the interested parties who prepare and procure the passage of an Act granting themselves some special privilege or franchise like this, are more responsible for it than the members of the Legislature. The average member, having no special interest in the matter, and knowing little if anything about it, but seeing that the Act contains a plain provision that the bridge shall be built with a good and sufficient draw anyhow, with that understanding gives his consent to its passage; and I think it ought to be so construed by the Court.

Considered in this, its true light, the Act is only a license to the corporation named therein, or its assigns to build a draw-bridge at this point,

subject to the Act of Congress of 1859; or in other words, so as not needlessly to impede or obstruct the navigation of the river, considered as a "common highway." Beyond this the Legislature could not go, and it is not to be presumed that it so intended.

The decision in *Escanaba Co.* vs. *Chicago*, 107 U. S., 678, so much relied on by the plaintiff herein, is not in conflict with these views. In a legal point of view, the case is not new, though it contains some wholesome suggestions upon the application of the law to the facts and circumstances of that case, which are peculiar and altogether different from this.

A small bayou, called a river, with a current less than a mile an hour, not a mile in length below its two branches, not exceeding two miles in length each, not naturally over 150 feet in width, and lying in the heart of a great city, was deepened and widened so as to serve as a canal or convenient water-way, whereon to move the lake boats from the harbor in the lake outside, into which it drained, to the docks and warehouses along its banks. Over it there are a number of drawbridges erected by public authority, on which pass daily great numbers of people—particularly in going to and returning from their business and employment in the morning and evening. Am. Cyclo., Chicago.

The city, by the authority of the State, and with a view of preventing the inconvenience resulting from the unregulated and conflicting use of the bridges and the water-way, passed an ordinance requiring the draws to be closed for the benefit of the land travel for one hour in the morning and evening, and limiting the period during which a draw might be kept open for the passage of vessels to ten minutes at any one time.

The suit did not involve the right to build the bridges, nor the sufficiency of the draws. The right of the city on both these points was taken for granted, and the only question made and decided was, whether, under the circumstances, this was a reasonable regulation, one that did not needlessly obstruct the use of the water-way, and the Court, if I may be allowed to say so, very properly and wisely held that it was.

The case was brought in the Circuit Court of the United States upon the assumption that the provision of the fourth article of compact of the ordinance of 1787, whereby the navigable waters of the Northwest territory was declared "common highways" was still in force in Illinois, and therefore the reasonableness of the city ordinance when judged by this United States law, was a Federal question, and the national Courts had jurisdiction of the case, and the decision was actually made upon this hypothesis. But the

learned Justice who delivered the opinion of the Court, went farther and said that by the admission of Illinois into the Union, "on an equal footing with the original States in all respects whatever," the ordinance ceased to have any effect within her limits, and therefore there was no law of the United States regulating the use of the navigable waters of the United States within the State of Illinois, and therefore the latter was the judge of what was reasonable in the premises.

The cases cited in support of this latter conclusion are *Pollard* vs. *Hagan*, 3 How., 212; *Permoli* vs. *New Orleans*, Id., 589, and *Strader* vs. *Graham*, 10 How., 82.

By the first one, as we have seen, it was simply held that Congress cannot by any compact or condition made with or laid upon a State on her admission into the Union, restrain or limit her municipal power, as such State, but that if the subject of the compact or condition is within the power of Congress to enact or regulate, without the consent of the State—as to declare that the navigable waters therein shall be "common highways"—it is good as a law.

In Permoli's case, the Court only held that so much of the articles of compact as secured religious freedom to the inhabitants of the territory of Orleans—the same having been specially extended there by Congress—ceased to have any

force or effect therein upon the admission of the territory into the Union as the State of Louisiana, because the subject of religious freedom in a State was beyond the power of Congress and exclusively within that of the State.

In Strader's case, it was decided on a writ of error to the Supreme Court of Kentucky, that the condition of a negro held as a slave in that State, and who had been allowed to visit Ohio, but afterwards returned, was, after such return and in said State, a question arising solely under the laws of Kentucky, and therefore not within the jurisdiction of the Supreme Court.

But in delivering the opinion of the Court, Mr. Chief Justice Taney, referring to some sort of claim that had been made in the argument, that the provision in the Articles of Compact of the Ordinance of 1787, prohibiting slavery in the Northwest Territory, of which Ohio was a part, had some bearing on the question of the status of the negro, denied that it could have any effect outside of such Territory, and then took occasion further to say that the Ordinance was no longer in force, even in Ohio, where it had been superseded by the organization and admission of the Territory into the Union as a State, and added that it had been so decided in the cases of Permoli *vs.* New Orleans and Pollard *vs.* Hogan, *supra.* But this statement, though true generally, and in

the light in which the Chief Justice was considering the articles, that is, so far as they trenched upon the municipal power of the State, or were inconsistent with its control over its domestic affairs, was not otherwise accurate or correct. And for this reason both Justices McLean and Catron, while assenting to the decision, that the Ordinance had no application to the case in any view of the matter, and that the Court had no jurisdiction to review the judgment of the Kentucky Court, protested against this dictum of the Chief Justice—the latter putting his dissent especially on the navigation clause of the fourth article of the Compact, and saying: "For thirty years the State Courts within the Territory ceded by Virginia, have held this part of the fourth article to be in force and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative of the rights of others, in a case where the fourth article is nowise involved, and when our opinion might be disregarded by the State Courts, as obiter and a dictum uncalled for."

And as we have seen, the only question decided in Permoli's, was that the clause in the Compact securing religious freedom to the inhabitants of the Territory, was necessarily superseded upon its admission into the Union as a State; while it is admitted that the principle of this ruling would

include all similar provisions in the Compact. In Pollard *vs.* Hagan, while it was held that a State could not be hampered or bound, in its admission into the Union, with conditions or compacts that would limit or restrain its municipal power and right, as compared with the other States therein, it was distinctly decided, that the clause in the Ordinance—as applied to Alabama by the Act of Congress of March 2, 1819 (3 Stat., 489), authorizing the people of that Territory to form a Constitution—declaring the navigable waters of the future State "common highways," was not such a condition, but a valid law which Congress had the power to enact, whether the waters were within a State or Territory.

I, therefore, respectfully submit that the clause in the fourth article of the compact in the Ordinance of 1787, relating to the navigable waters in the Northwest Territory, having been enacted by Congress (1 Stat., 50), was a valid commercial regulation as to the navigable waters in said Territory or the States afterward formed therein until repealed by it; and, therefore, it is still in force in Illinois. But be this as it may, the decision does not touch the question of the validity or force and effect of the Act of 1859. For on what possible ground can it be claimed that the admission of Oregon into the Union set aside or superseded an otherwise valid clause in the very

Act of Admission, declaring the navigable waters of the future State "common highways?"

Our position upon this question was also sustained by his Honor Judge Sawyer, in the case of *Woodruff* vs. *North Bloomfield G. M. Co.*, 1 West Coast Reporter, p. 212.

It impossible for us to add anything to what has been so ably said by the learned Judges who have so recently passed upon the question, and we therefore submit it to the Court upon the reasoning and authorities cited in their opinions above mentioned.

II.

It is alleged in the bill, and, of course, admitted for the purposes of the demurrer, that the bridge in question was constructed pursuant to the provisions of a special Act of the California Legislature of May 6th, 1861, which Act, we claim, was and is in conflict with the Constitution of the State of California, inasmuch as it was a direct attempt to confer special privileges upon the corporation defendant. But as this is a question of secondary importance, we will not now discuss it further than to call the attention of the Court to the cases upon which we rely to sustain the propositions, which are:

Low vs. *Marysville*, 5 Cal., 216.

San Francisco vs. *Spring Valley Water Co.*, 48 Cal., 493.

Waterloo Turnpike Co. vs. *Cole*, 51 Cal., 384.

Omnibus R. R. Co. vs. *Bauldwin*, 57 Cal., 160.

All of which is respectfully submitted.

J. J. SCRIVNER,
Solicitor for Complainant and Appellant.

JOHN L. BOONE,
Of Counsel.

Service hereof admitted and copy received this day of 1884.

.....

Attorney for

113-205

SUPREME COURT OF THE UNITED STATES,

October Term, 1884.

No. 855.

JOHN T. CARDWELL, Appellant,

vs.

THE AMERICAN RIVER BRIDGE COMPANY.

Brief and Points of the Appellee, the Bridge Co.

J. B. HAGGIN and BRITTON & GRAY,
Counsel for the Appellee.

Service hereof admitted and copy received this day of 1884.

.....

Attorney for

113-205

SUPREME COURT OF THE UNITED STATES,

October Term, 1884.

No. 855.

JOHN T. CARDWELL, Appellant,

vs.

THE AMERICAN RIVER BRIDGE COMPANY.

Brief and Points of the Appellee, the Bridge Co.

J. B. HAGGIN and BRITTON & GRAY,
Counsel for the Appellee.

Supreme Court of the United States.

No. 855.

JOHN T. CARDWELL, Appellant,

vs.

THE AMERICAN RIVER BRIDGE COMPANY. Appellee.

Brief and Points of The American River Bridge Company, the Appellee herein.

This is a bill in equity to abate as a nuisance a toll bridge across the American River, built and maintained by the appellee. The Circuit Court sustained a demurrer to the bill, and the appeal is from a decree made in pursuance of the order sustaining the demurrer.

The question to be decided is, whether, upon the averments of the bill, the complainant and appellant is entitled to the relief demanded, or to any relief.

Statement of Facts.

It appears, from the allegations of the complainant, that the American River lies wholly within the State of California, and that the bridge of the defendant was built and is maintained pursuant to authority conferred upon the grantors and predecessors of the defendant, by an Act of the Legislature of the State of California, approved May 6th, 1881.

These points were conceded on the argument of the case in the Circuit Court, and we presume will not be controverted here.

The following is a copy of the Act referred to:

"CHAP. CCXCVIII.—*An Act to grant the right to construct a Bridge across the American River to certain parties.*

[Approved May 6, 1861.]

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. R. A. Pearis and L. B. Harris, as Trustee, for the use and benefit of Amanda C. Harris, together with such as they may admit, shall take, have, possess, and enjoy, all the rights, privileges, rights of way, franchises, and immunities, heretofore [hereinafter] mentioned, upon condition that they and their associates shall incorporate themselves under the general laws of the State regulating corporations and providing for the incorporation of Bridge Companies, and shall adopt the name of the American River Bridge Company and shall abide by and fulfill the further conditions hereinafter mentioned.

"SEC. 2. Said company, wher incorporated as aforesaid, shall have full power to rebuild, reconstruct, and maintain a public toll-bridge, so soon as the condition of the present bridge shall require such reconstruction, across the American River, at, or near, the same place where they now have a licensed toll-bridge across said river, and have and enjoy all rights, privileges, and immunities, thereunto appertaining, and shall have the right of way across said river, and the privilege of using the same for that purpose, which is hereby granted and ceded to said company for the term of twenty-five (25) years. Said company shall at all times, after its incor-

poration, keep said bridge in passable order and condition, and shall be responsible for any damages arising to persons, or property, crossing said bridge, caused by neglect to keep said bridge in proper repair and condition.

"SEC. 3. The said bridge, when it shall be rebuilt and reconstructed, shall be built and constructed in a good and subitantial manner, and of the most durable materials.

"SEC. 4. The said company, from the time of its incorporation, shall be authorized and empowered, as well upon the bridge already in use as upon the one that may hereafter be constructed, to charge and collect such rates of toll as the Board of Supervisors of Sacramento County may fix annually; *provided*, the Legislature may, at all times, modify or change, the rates so fixed by said Board of Supervisors.

"SEC. 5. Said company may regulate and determine the speed of travel, riding, or driving, upon said bridge, and may require the speed not to be faster than a walk; and for each violation thereof, the party so violating may be fined, in any competent court, in any sum not less than ten dollars, nor more than fifty dollars; *provided*, further, that said parties, thus violating such regulations, shall always be answerable, in any court of competent jurisdiction, for the actual damage sustained.

"SEC. 6. Said company shall keep, in some conspicuous place at each end of the bridge, a bulletin board, which shall contain the scale of prices and notice of speed allowed on said bridge.

"SEC. 7. It is further *provided*, that nothing in this Act shall be construed as in any manner whatever, to interfere with, or in anywise, lessen, or curtail, the rights and privileges which said parties now possess and enjoy under the general law concerning ferries and toll-bridges.

"SEC. 8. No ferry or toll-bridge shall be established within one mile, immediately above, or below, said bridge now existing, or the one hereafter to be built, or reconstructed, unless it be required by public convenience."

It will be perceived that the authority conferred by this Act is to rebuild an existing bridge, and maintain it for a period of twenty-five years upon certain conditions.

It is not averred, and will not be presumed, that defendant or its successors failed, in any particular, to comply with the conditions of the grant, or that their present bridge differs from the bridge they were authorized to rebuild.

Argument.

The question arising upon the facts above stated, is whether the defendant is justified in obstructing the navigation of the American River, a stream admitted by the demurrer to be navigable.

The power of the several States, in the absence of Congressional interference, to authorize the partial or total obstruction of the navigation of streams lying wholly within their own borders, is thoroughly established.

Wilson vs. Blackbird Creek Marsh Co., 2 Pet. 246.
Gilman vs. Philadelphia, 3 Wal. 724.
Pound vs. Turk, 95 U. S. 459.
Hatch vs. Wallamet Bridge Co., 7 Sawyer, 132-3-4.
Escanaba Co. vs. Chicago, 107 U. S. 678.
Miller vs. Mayor of New York, 109 U. S. 385.

These cases are in no wise inconsistent with the Wheeling bridge case.

13 Howard, 518.

In that case the State of Pennsylvania was the complainant, and the defendant sought to justify the obstruction under the authority of an Act of the Legislature of Virginia. But the Ohio River did not lie within the limits of the State of Virginia. It flowed for a short portion of its course only by the borders of that State, and a bridge at Wheeling was an obstruction to communication between Pennsylvania and all the States of the Mississippi Valley and foreign lands. This of itself was a sufficient reason why the authority of Virginia was no justification of the obstruction, and broadly distinguishes that case from **Gilman vs. Philadelphia**, and the cases above cited.

But it was not alone for this reason that the Wheeling bridge was held an unlawful structure.

The Act of Virginia, of 1789, assented to by Act of Congress (**1 Stat. 189**), provided that the use and navigation of the *Ohio River* should be free, etc.

13 Howard, p. 561.

This was legislation by Congress, ratifying a compact of States, providing for free navigation of that particular river, specially named in the Act.

No such state of facts is presented by this case. The American is purely a California stream; a bridge across it is no obstruction to communication between other States; it violates no compact between California and another State; it conflicts with no law of Congress by which the navigation of the *American River* is especially provided for.

But it is averred (p. 4 of record) that the Act of the Legislature of California under which defendant claims the right to maintain its bridge, is invalid for two reasons:

First.—Because it is in conflict with the constitution of California.

Second.—Because it is in conflict with the Act of Congress admitting California as a State, by which it is provided "that all the navigable waters within the State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost or duty therefor."

9 Stat., 452, 453.

The first of these propositions was not much insisted upon in the Circuit Court, and, as will be seen, was entirely ignored by the Circuit Judge in the opinion delivered by him.

(Pages 12 to 18 of record.)

But as the point may be made by appellant here, we will very briefly state the grounds upon which we contend that the Act referred to must be held not to be in conflict with the constitution of California.

A.

The facts pleaded show that the defendant's rights under the Act, if it was not originally invalid, vested and accrued long before the adoption of the constitution of 1879, and we need not stop to contend in this forum that a change in the constitution could not divest them.

Was the Act, then, unconstitutional when passed?

To support the proposition that it was, complainant relies on the cases of

San Francisco vs. Spring Valley W. W., 48 Cal. 493.
Waterloo Turnpike Co. vs. Cole, 51 Cal. 381.

These cases were reviewed in the opinion of Judge Sawyer, of the Circuit Court of the Ninth District, in the case of

S. P. R. R. vs. Orton, 6 Sawyer, 185,

where it is held and very satisfactorily shown that they do not settle the doctrine of the Supreme Court of California upon the point under discussion, and that they ought not to be followed as a rule of decision.

Neither has the doctrine of those cases been settled by any decision of the Supreme Court of California, as newly organized. It was discussed by Justice McKinstry in his separate opinion in **The Omnibus R. R. Co. vs. Baldwin, 57 Cal. 170.**

But this point is not necessarily involved in that case, and the decision of the Court was rested upon another ground.

Besides, we think this law could be distinguished from the Ensign law, by the different nature of the right involved, and taken out of the operation of the rule laid down in that case upon principles expressly and impliedly stated and involved in the opinion of the Court. The right to bridge a navigable stream at a particular point is necessarily the subject of local and special regulation. The State has the power to grant it, and it can be enjoyed on no other terms, and we cannot perceive how the right to grant it to a corporation can be denied, if it is conceded that it could be granted to a natural person.

That this right is no part of the corporate franchise is demonstrated by the fact that it was granted for a term of twenty-five years only, while the term of the incorporation might have been fifty years.

But without stopping to elaborate this distinction, we claim that there is nothing in this bill to show that we did not rebuild our bridge long before the Spring Valley case was decided (in 1874) and after the decision of the case of **California State Tel. Co. vs. Alta Co (22nd Cal. 398,** in 1863). As matter of fact, the bridge was washed away and rebuilt a second time, after 1863 and prior to 1874.

If the proper construction of the complaint is consistent with the fact here stated, and we think it is, then it appears that our rights under this Act vested during the time when

the constitutionality of such laws was not only unquestioned, but positively affirmed by the Supreme Court of California.

Cal. State Tel. Co. vs. Alta Co., 22 Cal. 398.

If so we are brought within the protection of the rule now thoroughly established in the Federal Courts, that when a certain class of legislation is held constitutional by the highest Court of a State, and rights become vested in view and upon the faith of such decisions, such rights cannot be divested by any subsequent change in the construction of the State Constitution.

S. P. R. R. Co. vs. Orton, 6 Sawyer, 195.

And cases there cited.

Upon these grounds we think the Court will find no difficulty in holding that the Act referred to is not invalid by reason of any conflict with the constitution of California.

Besides the special authority granted to defendant, and its predecessors, by the Act of May 6, 1861, above quoted, we showed in our argument in the circuit, by the citation of a long list of the general statutes of California, that as early as 1850 authority was conferred upon the County Courts, and subsequently upon the Boards of Supervisors of the respective counties, to license the erection of bridges across streams not declared navigable by law. We showed, also, that in the same connection, and as a part of the same system, an Act was passed enumerating the navigable waters of the State; that this enumeration, at first, embraced the American River from its mouth to a point several miles above defendant's bridge; that, by successive amendments, the highest point of navigation on the American River was put nearer and nearer its mouth until, in the year 1860, it was dropped out of the category of navigable streams, and thereby became subject to the general law authorizing the Board of Supervisors of Sacramento to license a bridge across it at the point where defendant's bridge was afterwards constructed. We did this for the purpose of showing that there was authority under *general laws*, of which the Court could take judicial cognizance, for the erection of a bridge, such as defendant has built, at a period anterior to its construction.

But we omit this portion of our argument here principally

because the printing of the several statutes of California relating to this subject, would swell this brief to an unweildy bulk, and because we are confident that the Court will find in the special statute, on which we rely, no repugnance to the State Constitution.

B.

The important and controlling question in the case relates to the effect of the clause quoted from the Act of Congress admitting California as a State.

It is contended that, by virtue of that clause in the Act of admission, **California has been deprived of the right and the power, possessed and habitually exercised by the other States of the Union, to license the obstruction of navigation upon their internal waters by the erection of bridges designed to facilitate intercourse and traffic among their citizens.**

That the other States of the Union generally possess this power, and that their authority has always been held sufficient to justify such obstructions, is conceded.

The doctrine of **Gilman vs. Philadelphia, 3 Wallace, 724,** has never been questioned. On the contrary, it has been again and again, and very recently, reaffirmed.

Escanaba Co. vs. Chicago, 107 U. S. 685.
Miller vs. Mayor of New York, 109 U. S. 385.

The obstruction complained of in that case was precisely such as this defendant is accused of maintaining, and yet the Act of the Legislature of Pennsylvania authorizing the erection of the bridge was held to be a complete justification.

The bridge here complained of has likewise been authorized by the Legislature of California. We do not think this proposition is seriously controverted by counsel for complainant; and, at all events, we think we have shown that it is true.

But it is seriously contended that the State of California has, by reason of the clause quoted from the third section of the Act of Admission, been forever deprived of the power appertaining to the other States of the Union to make local regulations affecting the navigation of her domestic waters. This proposition, we admit, is sustained by the decision of the

Circuit Court in the case of **Hatch vs. Wallamet Bridge Co., 7 Sawyer, 132.** But we submit that this Court, in the case of **Escanaba Co. vs. Chicago, 107 U. S. 678,** has overruled the doctrine of that case.

We will elabarate this proposition somewhat.

In the case last cited the Court, in commenting upon the cases in which the right of the several States to authorize the obstruction of their navigable waters by bridges is upheld, makes use of the following language (p. 687):

"The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established: That the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation," citing

Welton vs. State of Missouri, 91 U. S. 275.
Henderson vs. Mayor of New York, 92 Id. 257.
County of Mohill vs Kimball, 102 Id. 691.

"On the other hand, when the subjects upon which the power may be exercisad are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supercedes it," etc.

We ask the particular attention of the Court to this and the succeeding passages of that opinion.

It will be seen to embody the accepted theory of the *Constitutional* relations of the several States to the Federal Government, with respect to the commercial regulations.

Under the *Constitution* the jurisdiction of Congress is exclusive, whether exercised or not, with respect to all matters susceptible of general regulation.

But with respect to all matters of special and purely local expediency, such as the bridging of particular streams lying wholly within the borders of a State, the power to regulate and direct is wisely committed to the several States, to be by them exercised without impediment until Congress sees fit to interfere.

This is the right of the States generally under the *Constitution.* And the question is whether Congress can, by a proviso or condition, a stipulation or article of compact, inserted in an act purporting to admit a State to the Union on terms of perfect equality with the other States, deprive her after admission of this undoubted constitutional right.

For this is unquestionably the effect of the clause relied on, if it has the meaning attributed to it.

It is not in itself a regulation by Congress of any matter of local or special expediency. It does not say such and such a stream, although navigable in fact, may be bridged, because a bridge is of more importance to the public than the navigation of the stream. On the contrary, it is a general and sweeping prohibition of all such regulation by the State, and an assumption by Congress of the sole and exclusive right with respect to California, to initiate and enact laws of a class which, in the States generally, may be enacted by their respective Legislatures, and enforced until Congress steps in and supersedes the action of the State.

It seems to us impossible to deny that this is, in effect, depriving California of an important constitutional right.

It is important because there is just as much necessity in California as in any State, for the erection of bridges over streams that may be navigable, where the public will be benefited by the bridge out of all proportion to the loss by the stoppage of the navigation of such streams. And if the Legislature of the State is powerless to act in such cases, it follows that every time a bridge is to be built, the citizens of California must appeal to Congress, although in a similar case the citizens of Pennsylvania, or Delaware, or Illinois, or Wisconsin, or Mississippi, could safely proceed upon the authorization of the State.

It is important because, as said by the Court in Escanaba Co. vs. Chicago, "the local authority can better appreciate their (bridges over navigable streams) necessity and can better direct the manner in which they shall be used and regulated than a government at a distance. It is therefore a matter of good sense and practical wisdom to leave their control and management with the States; Congress having the power, at all times, to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

And it is a constitutional right because it has been so decided.

Escanaba Co. vs. Chicago, 107 U. S., 688-689.
Withers vs. Buckley, 20 Howard, 92.

In both these cases the same effect was sought to be attributed to language similar to that quoted from the Act admitting California that complainant contends for here, and in both it was decided that such a construction would have the effect of depriving the State of its equal rights under the Constitution, with respect to a matter wisely left by the Constitution to the discretion of the several States.

The fact that there is no draw in the defendant's bridge, it seems to us, is of no importance in the consideration of this question. There was no draw in the bridge over the Schuylkill (Gilman vs. Philadelphia), and the dam in the Blackbird Creek Marsh case (2 Pet. 245) was a complete obstruction.

It is clear that the older States, and a majority of all the States, can completely obstruct the navigation of any of their domestic waters by the erection of bridges and dams if they consider it expedient to do so. Is this discretion denied to California, Oregon, and other States recently admitted, or is it not? If it is denied to them, they have not the same rights in the Union which other States have; if it is not denied to them, they can license the erection of bridges without draws.

It is not to be presumed that a State will exercise such a power unwisely or unjustly. The local Legislature knows better what is demanded by local wants than Congress can possibly know, and is much more accessible to those immediately interested than is the Congress of the United States. Upon these views, we submit that the judgment appealed from should be affirmed.

J. B. HAGGIN and
BRITTON ~~& GRAY~~,
Counsel for Appellee.